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In The

Supreme Court of the United States

October Term, 1991

ITEL CONTAINERS INTERNATIONAL CORPORATION,

Petitioner,

v.

JOE HUDDLESTON,
COMMISSIONER OF REVENUE OF TENNESSEE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Tennessee

BRIEF AMICI CURIAE OF PACIFIC MERCHANT SHIPPING ASSOCIATION, STEAMSHIP OPERATORS INTERMODAL COMMITTEE, COUNCIL OF EUROPEAN AND JAPANESE NATIONAL SHIPOWNERS' ASSOCIATIONS AND AMERICAN INSTITUTE OF MERCHANT SHIPPING IN SUPPORT OF PETITIONER

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All references in this brief to "Brief for the United States" are to the brief which was filed by the United States in response to the petition.

INTEREST OF AMICI CURIAE

Amici are associations of international ocean carriers[1] which, as lessees of cargo containers, will be required to pay sales tax imposed on container lease hire if the tax here is upheld.[2] The members of the associations include most of the foreign and American containership operators engaged in North American foreign trades. These carriers lease the foreign built cargo containers at issue for use in international commerce, and they pay the per diem charges thereon which are subject to the tax.

The members of the amici associations have a direct stake in the outcome of this case. They will bear not only the state sales tax burden but also the consequences of

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[1] Amici Pacific Merchant Shipping Association and Steamship Operators Intermodal Committee are trade associations whose members are foreign and American ocean carriers operating in United States and worldwide foreign trades. The Council of European and Japanese National Shipowners' Associations is an international association composed of national associations of foreign shipping companies engaged in worldwide trades. The American Institute of Merchant Shipping is an association of American ocean carriers whose vessels are registered in the United States and who operate in worldwide commerce.

[2] As is the case with most sales taxes, Petitioner is required to attempt to collect the tax from the ocean carriers. Tenn. Code Ann. § 67-6-502 (1989); *see* Cal. Rev. & Tax. Code § 6203 (West Supp. 1992) (the retailer "shall . . . collect the tax from the purchaser . . . ") As the Court observed in *Goldberg v. Sweet*, 488 U.S. 252 (1989): "The tax at issue has many of the characteristics of a sales tax. It is assessed on the individual consumer, [and] collected by the retailer . . . "

any foreign retaliation or multiple tax sought to be imposed by any of the many foreign tax jurisdictions in which the carriers, their vessels and their containers are found. Amici are concerned that both the tax at issue and counterpart state use taxes are highly provocative internationally, that revenues from such transactions are readily subjected to multiple taxation, and that the tax likely will trigger adverse foreign tax reactions.

The ocean carriers also have a significant stake in the manner in which the tax is calculated. The tax applies to all per diem charges owed under a lease involving a change in possession in Tennessee, not just to charges for use of the containers in the state and in the United States. The tax reaches charges for the large numbers of lease days that the containers are aboard vessels, moving within foreign countries or in the possession of connecting carriers, cargo shippers or consignees. Ocean carriers are affected by the absence of geographic apportionment of the tax, both because of the substantial extra tax cost and because absence of apportionment maximizes the chance of foreign tax retaliation affecting American and foreign carriers alike.

The stake that the ocean carrier members of the amici associations have in the outcome of the case is large. First, containers are found, stored, used and change possession repeatedly in virtually every significant tax jurisdiction in the world, making the ocean carriers especially vulnerable to multiple taxation. Second, the sheer size of their container fleets and the frequency of container leasing create substantial potential tax liability. Three to four

containers are required for every container space on a vessel because of the large amounts of time containers spend in the possession of connecting carriers or being loaded, discharged, stored and positioned ashore.[3] In a trade like the North American trade with Asia, the collective container fleet employed at any given time likely exceeds 500,000.[4]

Amici submit this statement to urge the Court to hold that the Commerce Clause and the Supremacy Clause, coupled with the Customs Conventions on Containers, preclude State taxation of containers present in the United States only as instruments of foreign commerce.

Pursuant to Rule 37, this brief is filed with the consent of all parties. Letters of consent from counsel have been filed with the clerk.

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[3] *See* R.F. Gibney, *Containerization Report*, Seatrade, April 1982, at 105, 107, 129.

[4] By 1986 the worldwide container fleet was estimated to number almost 5 million containers – nearly a doubling of the size of the fleet over a five-year period. T. F. Barnett, *Container Care and Feeding*, Pacific Maritime Magazine, Oct. 1986, at 12, 13. These container fleets are enormously costly to ocean carriers, whether the cost is experienced as a direct capital cost or as lease-hire. A new forty-foot dry cargo container costs about $6,800. A new forty-foot refrigerated container costs about $35,000.

STATEMENT

1. Facts.

This case involves a retail sales tax imposed upon gross lease hire paid by international ocean carriers for leasing foreign built ocean cargo containers. App. 30a-32a.[5] The containers enter the United States as instruments of foreign commerce under Customs bond assuring only such use. App. 30a. By treaty obligation, the United States admits them "free of 'all duties and taxes whatsoever chargeable by reason of importation.' "[6] Such containers must leave the country within a maximum period of three months.[7] Thus, the containers can only change possession under lease in the United States by reason of having previously been imported and admitted to the United States under Customs bond in import commerce and by reason of the companion requirement that they leave the country.

Although Tennessee exempts from sales and use tax the transfer of railroad rolling stock or vessels for use in interstate commerce,[8] no exemption is accorded to ocean cargo containers admitted under treaty and Customs bond and used exclusively in foreign commerce.

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[5] The Appendix to the Petition is cited throughout this brief as "App."

[6] *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 453 (1979); *see* Customs Convention on Containers, May 18, 1956 [1969] art. 2, 20 U.S.T. 301, 304 ("1956 Convention"), App. 42a; 19 U.S.C. § 1322(a), App. 43a; 19 C.F.R. §§ 10.41a(a), 115.1 (1991), App. 43a-44a.

[7] Customs Convention on Containers, Dec. 2, 1972 [1985] art. 4, 988 U.N.T.S. 43 ("1972 Convention"), App. 40a.

[8] Tenn. Code Ann. § 67-6-321 (1989).

The lease hire that is subject to the Tennessee sales tax is calculated on a per diem basis. App. 30a. Consequently, the tax varies in direct proportion to days that containers are under lease. App. 36a.

The sales tax applies whenever possession of leased containers is transferred to a lessee in Tennessee, regardless of where the lease is entered into, where payments are made, or what the nationalities of the parties are.[9] The tax is not limited to revenues generated only by lease days in which the containers are used in Tennessee or in the United States. Consequently, the tax which ocean carriers will bear applies to use of leased containers aboard vessels and in foreign countries and their use by connecting carriers in other jurisdictions. The tax applies even to periods that the containers are sub-leased by ocean carriers to other carriers outside Tennessee.

The ocean carriers use the containers as ship's equipment to transport cargoes in international commerce. *See Japan Line, supra*, 441 U.S. at 442-43; App. 34a-35a. Because of the length of ocean voyages and the time required for inter-carrier transfers, terminal handling and inland deliveries, containers are normally outside the United States as well as outside Tennessee during most of the lease term. Leases covering containers changing possession in the United States are frequently entered into and paid for abroad and are frequently transactions to which the only parties are foreign entities. Most

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[9] Tenn Code Ann. § 67-6-204 (1989); App. 27a, 36a. About 80 percent of Petitioner's lessees are foreign companies, primarily ocean carriers. *See* Tr. 31-33; App. 30a. Petitioner has no leasing or marketing employees located in Tennessee, and none of the leases at issue were entered into in Tennessee. App. 30a-34a.

containership operators are foreign.[10] In this case the leases subjected to tax were entered into in California, involved an American leasing company and included both short term individual leases and master interchange agreements covering multiple containers, supplied at different times on demand. App. 27a, 30a, 32a.

In addition to the charges paid to lessors, ocean carriers themselves levy charges for container use which are potentially subject to tax. Ocean carriers commonly have interchange agreements with connecting motor carriers under which per diem charges are assessed if the containers are not timely returned. Similarly, cargo interests are assessed per diem charges by ocean carriers if containers are detained beyond the time permitted in the ocean freight tariffs or if they are not picked up from carrier terminals in a timely manner.[11]

2. State Court Ruling.

This case arose when Tennessee audited container leasing companies having container depots in the state

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[10] American carriers owned as of 1982 only about 16 percent of world container vessels. R.F. Gibney, *Containerization Report*, Seatrade, April 1982, at 105, 107. The same containers used in United States/foreign trades are used in foreign-to-foreign trades. Moreover, it is leased containers which circulate most. T.F. Barnett, *Container Care and Feeding*, Pacific Maritime Magazine, Oct. 1986, at 12, 15.

[11] *See, e.g.*, Transpacific Westbound Rate Agreement Westbound Local and Intermodal Rules Tariff, FMC No. 10, Rules 32, 21-A and B, 91-C and D and 92-A – 92-L (filed with the Federal Maritime Commission); 46 C.F.R. §§ 580.5(d)(21) & 580.17 (1991); 55 Fed. Reg. 10242 (1990).

and imposed back taxes and penalties on Petitioner for failing to pay tax under Tennessee's Retailers' Sales Tax Act. The Tennessee Chancery Court interpreted the statute as applicable only to containers changing possession in the state by going on lease to ocean carriers, and it held that the tax was not applicable to containers delivered to cargo shippers for loading in Tennessee but going on lease to ocean carriers only when the container arrived at the ocean port. App. 20a-21a.[12] The Chancery Court ruled that the Constitution permits Tennessee to levy sales tax on the worldwide lease hire paid by the ocean carriers if possession of the containers passes to the ocean carrier in Tennessee. *Id.*

In affirming the Chancery Court, the Tennessee Supreme Court concluded that a sales tax imposed on container lease hire "is more analogous to a sales tax on fuel," sold from domestic supplies to foreign aircraft for consumption in flight, than to property taxes on the assessed value of cargo containers. App. 12a.[13] The court thus found that the case was governed by *Wardair Canada,*

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[12] The state where the port is located could levy a sales tax. Tennessee, like most States with sales taxes, also has a use tax, which provides: "A tax is levied at the rate of five and one-half percent (5.5%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state." Tenn. Code. Ann. § 67-6-203 (Supp. 1991). This use tax could apply to international lease hire when containers change possession between foreign nationals abroad or in other States.

[13] The court rejected a possible argument that the tax could be sustained against constitutional challenge if limited only to leases in which an American leasing company is the lessor.

Inc. v. Florida Dep't of Revenue, 477 U.S. 1 (1986), in which the parties had stipulated that the fuel tax was appropriately apportioned and that there was no prospect of double foreign taxation. The court distinguished *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), which had struck down an apportioned property tax on foreign containers because of the risk of multiple taxation and foreign retaliation. App. 12a, 14a-15a.

The court found dispositive that the Tennessee tax applied only if there were a change of possession of the containers in Tennessee, because foreign countries could not invoke the same taxable event to tax the same lease hire. App. 14a. Although the court noted that "[o]ther nations very well may adopt similar taxes on the transfer of possession of leased containers within their taxing jurisdictions," the court concluded that the Tennessee tax "creates no risk of multiple international taxation." *Id.*

In construing the Customs Conventions on Containers, which this Court has cited as evidencing "[t]he desirability of uniform treatment of containers used exclusively in foreign commerce" (*Japan Line, supra*, 441 U.S. at 452), the state court distinguished between a property tax apportioned to local container use, which conflicts with the uniform treatment contemplated by the Conventions, and sales taxes falling on worldwide container use, which the court held does not create such a conflict. App. 15a-16a. The court rejected the claim that the tax was inconsistent with the Customs Conventions and rejected the argument that the Conventions set forth national policy guiding the proper interpretation of the Commerce Clause. *Id.*

SUMMARY OF ARGUMENT

A sales tax upon lease hire for the use of marine containers in international commerce will be paid by the lessee ocean carriers. That tax should be evaluated under the same constitutional standards applicable to personal property taxes on containers that are owned by ocean carriers and used for the same purpose. The Tennessee court's distinction between a property tax on instruments of foreign commerce and a sales tax upon leases of such property conflicts with this Court's decisions and has no rational basis.

A sales tax, when applied to per diem charges for use of cargo containers confined to foreign commerce, must, as a threshold matter, be apportioned geographically so as to tax only revenues reflecting use of containers in the taxing jurisdiction. A sales tax levied on lease hire from a carrier's use of equipment over time is a tax upon that use wherever it occurs. Absent geographic apportionment, state taxation based on use of containers employed by foreign carriers on the high seas and in foreign countries is highly provocative and the likelihood of adverse foreign tax reactions is much greater than in the case of an apportioned personal property tax. Tennessee made no attempt to apportion its tax to exclude from taxation per diem lease hire from days the containers are used outside the jurisdiction, although such apportionment is possible. Other States have provided for apportionment of sales and use tax levied upon lease hire of such equipment used in interstate commerce so as to tax only lease hire applicable to the period the property is used in the state.

The state court's decision hinges on the erroneous assumption that multiple taxation of the same revenue is not relevant under the Commerce Clause unless both taxes are triggered by the identical event. Foreign countries can tax per diem charges on containers by levying use taxes similar to Tennessee's, based on the containers' storage or use abroad or on whatever other taxable event is chosen. Similarly, Tennessee can impose its use tax on foreign leases between foreign nationals where the containers change possession abroad, if the containers are used or stored in the state.

A tax which applies to revenue from foreign lease transactions between foreign nationals based on foreign use of containers, even if geographically apportioned, would be at least as likely to provoke multiple and retaliatory taxation as an apportioned property tax on the same containers. When a state breaks ranks with international norms by commencing taxation of instruments of foreign commerce and the tax is borne largely by foreign carriers it creates consequences for the United States and foreign countries alike. Foreign countries cannot negotiate with Tennessee concerning Tennessee's tax or retaliate against Tennessee alone. Tennessee's tax position becomes an American tax position. It effectively ties the diplomatic hands of the United States in protecting its own nationals, whether by resisting foreign measures or by mutual compromise concerning the application of both taxes.

The United States is a signatory to treaties whose purpose is to remove impediments to the use of containers as instruments of international commerce. These treaties reflect international custom and practice protecting containers from local taxation by establishing procedures through which containers enter and exit signatory nations free of duties or taxes by reason of importation. The containers at issue here can go on lease in the United States and incur the Tennessee tax only by reason of prior importation, and that importation is under terms that render them tax and duty free under the Customs Conventions on Containers. The narrow interpretation which Respondent has given these treaty obligations defeats their basic purpose.[14]

ARGUMENT

I. APPLICATION OF TENNESSEE'S SALES TAX TO LEASES OF MARINE CONTAINERS IMPERMISSIBLY BURDENS FOREIGN COMMERCE.

A. Sales Taxes On Container Lease Hire Are Subject to the Same Commerce Clause Standards As Property Taxes on Carrier-Owned Containers.

The Commerce Clause of the Constitution, as construed by the Court, permits states to tax instruments of foreign commerce only under limited circumstances. The

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[14] Amici have reviewed in draft Petitioner's argument concerning application of the Export-Import Clause to the Tennessee tax and adopt it.

Court has on varying grounds invalidated state taxes imposed on vessels from outside the taxing jurisdiction, federal taxes on charter hire and state taxes imposed on containers as ship's equipment. *Hays v. Pacific Mail S.S. Co.*, 58 U.S. (17 How.) 596, 598-99 (1855); *United States v. Hvoslef*, 237 U.S. 1, 17 (1915); *Japan Line, supra*, 441 U.S. at 442, 448-49.[15]

> In approving state taxes on the instrumentalities of interstate commerce the Court consistently has distinguished oceangoing traffic, *supra*, at 442; these cases reflect an awareness that the taxation of foreign commerce may necessitate a uniform national rule. Indeed in *Pullman's Palace*, the Court wrote that the "vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the national legislature." [*Japan Line, supra*, 441 U.S. at 449 (citations omitted).]

A tax on instruments of foreign commerce such as cargo containers must meet both the tests of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which require a substantial nexus with the taxing State and fair apportionment of the tax, and the tests of *Japan Line, i.e.*:

> whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation and, second, whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments". If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause. [441 U.S. at 451.]

[15] The Tonnage Duty Clause of the Constitution (art. I, § 10, cl. 3) prohibits state taxes or fees imposed as a privilege of a vessel call at a port in a state. It is a companion clause to the Export/Import Clause, and it reflects the same fundamental national policy. *See Steamship Co. v. Portwardens*, 73 U.S. (6 Wall.) 31 (1867).

A sales or use tax falls on buyers, who here are the international ocean carrier lessees of the containers – the same persons who would pay property tax on owned containers, absent the Court's ruling in *Japan Line*.[16] Sales or use tax on container leases has the same economic impact on ocean carriers as property taxes imposed on containers they own.[17] Sales or use taxes may have a larger impact than property taxes, especially if the mix of a carrier's container fleet includes a large portion of leased containers. Both taxes are imposed because ocean carriers must use containers within the taxing jurisdiction to move foreign cargoes in foreign commerce. Moreover, container lease hire largely reflects the lessor's own capital cost. A property tax on assessed value and a sales tax on lease hire each reflect the on-going value of the property to the ocean carrier. Unlike a one-time sales tax on the sale of property, Tennessee's sales tax based on total

[16] *See* note 2, *supra*.

[17] "Approximately 50 percent of the world's international container fleet is owned by container leasing companies. The rest of the containers are owned by carriers (46 percent) with small numbers belonging to shippers." G. Muller, *Intermodal Freight Transportation* 138 (2d ed. 1989). The leased containers constitute an equipment fleet whose use is shared by ocean carriers worldwide.

lease hire from recurring transactions operates much like a property tax.[18]

The constitutional standard applicable to a sales tax imposed on container lease hire paid by ocean carriers should be the same as the standard that applies to property taxes paid by ocean carriers on containers they own and use for the identical purpose. The decisions of this Court do not suggest that the constitutional standard differs, or produces different results, because of the label affixed to the tax or because the events selected by the state as the rationale for taxing differ.[19] What matters is whether a container or container lease hire is likely to be taxed more than once.

In applying the Export/Import Clause and exemptions from tax under the Customs laws to invalidate state taxes upon foreign commerce, the Court has not distinguished between sales and property taxes. The Court and a Court of Appeals treated property taxes and sales

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[18] Property taxes can be and are levied on possessory interests in leasehold property just as sales taxes can be applied to the same property. *Compare Seatrain Terminals of California, Inc. v. County of Alameda*, 83 Cal. App. 3d 69 (1978) (possessory interest property tax), *with United States Lines, Inc. v. State Board of Equalization*, 182 Cal. App. 3d 529 (1986) (sales tax). Use taxes, imposed on storage or use of property, are based on presence of the property in the jurisdiction much like a property tax.

[19] The state court's formalistic distinction between a sales tax and a property tax contravenes the Court's commitment to testing a state tax "based upon its actual effect rather than its legal terminology." *Complete Auto Transit, Inc. v. Brady, supra*, 430 U.S. at 281.

taxes similarly in invalidating both types of taxes. *Compare Richfield Oil Corp. v. State Board of Education*, 329 U.S. 69 (1946) (sales tax invalid under Export/Import Clause), *and McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414 (1940) (sales taxes invalid under Customs statute), *with Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982) (property tax on bonded goods preempted), *and Louisiana Land & Exploration Co. v. Pilot Petroleum Corp.*, 900 F.2d 816 (5th Cir.), *cert. denied*, 111 S. Ct. 248 (1990) (invalidating excise tax under Export/Import Clause). The state court erred in distinguishing the above cases simply because they were rulings under the Export/Import Clause or Customs statutes, rather than under the Commerce Clause. *See* App. 10a.[20] These cases demonstrate that, in determining whether state taxes burdening foreign commerce pass constitutional muster, no distinction should be made between property and sales taxes because in both cases the burdens on foreign commerce are the same.

B. Tennessee's Sales Tax Fails A Critical Threshold Test Because It is Not Geographically Apportioned.

Tennessee's tax, as applied to lease hire for carrier use of instruments of foreign commerce, fails a basic test that *Japan Line* treated as a threshold requirement. The

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[20] The state court also found it significant that, under the statute addressed in *McGoldrick* and *Xerox*, the goods were in bonded warehouses "in the joint custody and continuous control and supervision of customs officers and the warehouse proprietor." App. 9a. However, in the case of bonded warehouses, custody, continuous control and supervision by customs officers are largely legal fictions.

test rejects taxes that, because unapportioned, intrinsically have such a high probability of provoking multiple or retaliatory foreign taxes that it is unnecessary to analyze separately the probability of adverse foreign reaction. Although *Japan Line* makes clear that apportionment of a tax imposed on instruments of foreign commerce is not enough to save the tax, it also makes clear that proper apportionment is essential if such a tax is to have any prospect of being upheld. 441 U.S. at 447, 450-51.

In *Japan Line*, the apportionment that met the Court's threshold test was based on "average presence" of marine containers in the jurisdiction over the course of a year. *Id.* at 437. The apportionment requirement was explained in *Goldberg v. Sweet*, 488 U.S. 252 (1989), in the context of an excise tax on interstate commerce treated by the Court as a sales tax. A state may tax:

> only that portion of the revenues from the interstate activity which reasonably reflects the instate component of the activity being taxed. [*Id.* at 262.]

Only if the state tax meets the apportionment test is it necessary for a court to determine whether the tax "notwithstanding apportionment" is likely to create double or retaliatory taxation or prevents the United States from speaking effectively with one voice. *Japan Line, supra*, 441 U.S. at 451.

Goldberg involved interstate telephone calls in domestic commerce and a proposal for geographic apportionment of millions of electronic impulses not capable of being apportioned by the traditional geographic allocation used in the case of large, tangible instruments of commerce like trucks or containers. Hence the tax there

was allocated by permitting each state to tax calls billed to an address in the state, regardless of where the call was initiated or received. *Goldberg* approved an apportionment of sales tax based on practical considerations concerning the matter taxed. It also made clear that the appropriate apportionment for "the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State" is geographical apportionment reflecting use of the equipment in the jurisdiction. *Id.* at 264. Indeed, that is the basis on which other taxes on motor carrier equipment are required to be apportioned. *See American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 291-92 (1987).[21]

Application of *Japan Line's* geographic apportionment requirement to sales or use tax imposed on lease hire paid by carriers for the use of instruments of foreign commerce is not novel. Nor does it affect the generality of sales and use taxes applied outside this specialized context. It is already the basis on which some states, undoubtedly in recognition of Commerce Clause constraints, have apportioned their sales and use tax as applied to leases of such equipment. California and Wisconsin provide for apportionment of sales or use tax applicable to leases of personal property which are treated as

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[21] Ocean cargo containers are physically similar to motor vehicle trailers with the minor exception that ocean containers are removable from the underlying wheeled chassis to permit movement more readily on vessels and rail cars as well as by highway. Geographic apportionment is a minimal requirement for both types of equipment, but particularly so as to containers dedicated to foreign commerce because their taxation raises all the problems outlined in *Japan Line*.

> . . . a continuing sale . . . as respects any period of time the leased property is situated in this state, irrespective of the time or place of delivery of the property to the lessee or such other person. [Cal. Rev. & Tax. Code § 6006.1 (West 1987); *see* Wisc. Stat. § 77.51(j) (1990).]

Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1 (1986), did not eliminate *Japan Line*'s threshold apportionment requirement as applied to sales taxes imposed on leasing instruments of commerce.[22] The case involved a tax on domestic fuel supplies sold to aircraft. The airline claimed that, where fuel sales were made to foreign aircraft to be consumed in flight, the sale could not be subject to local fuel taxes. It was conceded in *Wardair* that the tax *was* appropriately apportioned and that there was no prospect of multiple taxation by foreign countries when the aircraft arrived there. *Id.* at 8. The Court upheld the tax. No other country was likely to tax fuel largely consumed in the international flight, and each country could tax its own domestic fuel sales to the aircraft for the next flight. *Wardair* has no relevance to the apportionment which *Japan Line* and *Goldberg* require here.

Even if a state unilaterally apportions its tax, a sales or use tax on container lease hire creates the same international problems that were fatal to the apportioned property tax at issue in *Japan Line*, because there is no

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[22] *Department of Revenue v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), is an example of a tax (there a business gross receipts tax) that did not require apportionment because the sole activity taxed was confined to the taxing state, and neither the taxpayer nor the gross revenue could be taxed elsewhere. The Court was careful to note that "[n]o foreign business or vessel is taxed." *Id.* at 754.

international agreement on apportionment and no international referee. An *unapportioned* sales or use tax *a fortiori* violates the Commerce Clause because it taxes per diem container lease hire for lease days when the containers are used abroad or on the high seas. An unapportioned tax like the one at issue here is a far blunter instrument and is much more provocative than an apportioned property tax.

Clearly, the Tennessee tax, which is not apportioned to reflect use of the containers in the state, violates the Constitution. Unlike the taxes on electronic impulses in *Goldberg* or taxes on sale to foreign aircraft of domestic fuel to be consumed in flight in *Wardair*, the lease hire days to which the tax here applies are readily apportioned geographically based on traditional methods.[23] No effort was made by Tennessee to apportion the tax geographically, and such failure in this context is fatal to the tax.

C. The Tennessee Tax Is Likely to Subject Container Lease Hire to Multiple Taxation.

The lease hire involved in this case could clearly be taxed by foreign countries. Indeed, the state court conceded that

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[23] Allocation methods include use of a ratio of days in the jurisdiction as compared to total lease days, as under California's tax (Cal. Rev. & Tax. Code § 6006.1 (West 1987)), mileage ratios reflecting distance traveled, or less costly formulae approximating the same.

> Other nations very well may adopt similar taxes on the transfer of possession of leased containers within their taxing jurisdictions. [App. 14a.]

Tennessee's own use tax, like most state use taxes, would subject lease hire revenues to use tax when containers go on lease outside the state but are used or stored for use in the state. *See* Tenn. Code Ann. § 67-6-203 (Supp. 1991). Foreign countries could do the same based on container use there.

The state court erroneously assumed that its inquiry into potential multiple taxation ended under *Japan Line* if foreign governments taxing the same lease hire could not do so *by basing their tax solely upon the identical "discrete transaction" selected by Tennessee*. This approach confuses the question whether multiple taxation or retaliation by foreign governments can or will occur with the question whether taxation of the same revenue could be based on the identical event selected by Tennessee.

Japan Line requires rejection of this extremely narrow approach. The state court's analysis nearly defines multiple taxation out of existence as a constitutional concern and makes the entire analysis of potential adverse foreign reaction required by *Japan Line* largely irrelevant. In *Japan Line*, Los Angeles sought to tax containers based on their presence in the jurisdiction, while Japan apparently taxed the containers based upon ownership by Japanese carriers and their use on Japanese vessels. 441 U.S. at 436. That the duplicative taxes were triggered by different premises did not save the apportioned California tax. Tennessee's attempt to distinguish its unapportioned sales tax on the ground that any multiple taxation of the same lease hire would be triggered by slightly different taxable events improperly displaces the practical analysis

required by *Japan Line* with conceptual labels. The proper test is whether the same container lease hire is likely to be taxed more than once, not whether the particular taxable event chosen by a state can occur only in one place.

State sales and use taxes, common in American states, both apply to the same interstate sales revenues. Clearly there would be duplicate taxation if both taxes were assessed on the same revenue. Yet sales tax is based on a change in possession of the property while use tax on the same revenue is based on use or storage of the same property in another state. What saves these duplicative taxes under the Constitution is that domestic use taxes generally provide credit for sales tax paid in other states,[24] not that both taxes could permissibly apply because based on different taxable events.

Duplicative state sales and use taxes illustrate the serious multiple international taxation problem that ocean carriers face. Since their containers are used, are stored, and change possession all over the world, multiple taxation is both possible and likely once one major nation commences to tax these lease revenues.[25]

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[24] It would appear that such a credit is required by the Commerce Clause, although the Court has not expressly ruled on this issue. *See Williams v. Vermont*, 472 U.S. 14, 21-22 (1985); *Japan Line, supra*, 441 U.S. at 446; *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311-12 (1938).

[25] Although *Japan Line* involved actual taxation of the containers in another country, it is clear that the constitutional standard relates to the risk of multiple taxation and does not require awaiting the actual event. *See Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 228-29 (1980); *Mobil Oil Corp. v.*

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Moreover, nothing requires foreign countries imposing use, sales or similar taxes on container lease hire to give credit for sales or use tax paid to American states.

Duplicative taxation will also occur in the case of leased containers changing possession abroad. Under the state court's constitutional rationale, in which double taxation is not prohibited if based on a different taxable event, American states would be free to apply use taxes to transactions in which the change in container possession occurs in foreign countries. *See* Tenn. Code Ann. §§ 67-6-203, 67-6-204 (1989 & Supp. 1991); Cal. Rev. & Tax Code §§ 6006.1, 6203 (West 1987 & Supp. 1992). American states provide no credit against their sales taxes for a use, sales or similar tax paid abroad. *See, e.g.*, Tenn. Code Ann. 67-6-507 (Supp. 1991); Cal. Rev. & Tax Code §§ 6006.1, 6406 (West 1987). Thus even California's apportioned use tax on lease hire would involve double taxation if a foreign tax applied.

The state court erred by relying exclusively upon an internal consistency test which asks whether, if all other jurisdictions applied the identical tax, double taxation would result. *See Goldberg v. Sweet, supra*, 488 U.S. at 261. Such a test assumes a common referee to determine which jurisdiction has tax primacy; it is inappropriate in evaluating taxation of international transactions which each country can tax on any basis it wishes. The state

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Commissioner of Taxes, 445 U.S. 425, 444 (1980). To require the actuality of double taxation before the Court acts would be especially inappropriate in foreign commerce because the United States cannot undo foreign reactions once they occur.

court's reliance solely on the fact that other countries could not tax the lease hire here if their tax were also to depend upon a change of possession in the taxing jurisdiction defeats the test required by *Japan Line* in the context of foreign commerce. That test, assuming apportionment, requires an analysis of whether foreign double taxation is likely and whether the "asymmetry" resulting when states break ranks with international norms is likely to provoke foreign response. *Japan Line, supra*, 441 U.S. at 449-50.

Wardair does not suggest that there could be no duplicative foreign taxation here. In *Wardair* the discrete event causing the Florida tax to apply was a sale of domestic fuel to be consumed in flight making it highly unlikely that foreign countries would tax either the fuel or its sale. Indeed, the parties there conceded that there was no threat of multiple international taxation, as there is here. The tax in *Wardair* was not provocative because it did not tax an instrument of foreign commerce, governed by international conventions designed to preclude duty or tax, but rather taxed the severance of fuel from a fungible domestic supply when purchased for use in foreign and domestic commerce alike. Had Florida instead sought to tax foreign aircraft or to tax charter hire on foreign aircraft paid by the Canadian air carrier for international aircraft use, based on a change in possession in Florida while still in foreign commerce, an entirely different question would have been presented.

Finally, the likelihood of multiple taxation here extends beyond multi-national taxation of the identical lease hire paid by ocean carriers. Possession of containers under lease to ocean carriers changes frequently through sub-leases and interchange of containers with connecting

carriers. These subsidiary changes in possession, which occur both domestically and abroad, are themselves often accompanied by an ocean carrier per diem charge.[26] Thus, even if foreign countries did not tax the basic lease hire taxed by Tennessee, other states or foreign countries in which the leased containers change possession and incur additional charges could impose sales or use tax for the same days that Tennessee is taxing under the basic lease.

D. Permitting The Tennessee Tax To Stand Will Provoke Adverse Foreign Reaction and Preclude the United States From Speaking With One Voice.

For the reasons that the Court emphasized in *Japan Line*, amici suggest that foreign objections and retaliation are likely if American states are permitted to tax international container lease hire.[27]

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[26] A sales tax imposed upon a charge made by the ocean carrier for use of the container by a cargo shipper or consignee would fall on an export or import and would be invalid for that reason. *See Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 80 (1946), and cases cited therein invalidating federal taxes on charter parties and bills of lading as taxes on exports. A tax on charges to connecting carriers and the tax here should similarly be invalid.

[27] Since this Court has not yet spoken and knowledge of the Tennessee tax is not widespread, no inference can be drawn from the fact that, as yet, foreign countries have not protested or commenced double or retaliatory taxation. *See* Brief for the United States at 7, n.8. So far as is known, Tennessee is the only jurisdiction anywhere to have imposed such a tax. Further, this

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> If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. [441 U.S. at 450.]

This is such a case. As Petitioner points out, foreign built containers, admitted to a country as instruments of commerce under the Customs Convention on Containers, are not subject to comparable taxes elsewhere. If this Court should uphold the tax, other states needing revenues will apply their sales taxes to similar transactions and their use taxes to transactions in which possession does not change in the state but the containers are used or stored in the state. By such piecemeal actions, the United States will have departed from international practice.

Such unilateral actions will cause international reaction affecting the entire country and its national carriers. Foreign nations whose carriers are adversely affected cannot deal diplomatically with Tennessee or retaliate solely against Tennessee. *See Japan Line, supra*, 441 U.S. at 450, n.16. If foreign nations object through diplomatic channels to the United States or retaliate against Americans, there is no effective way for the United States to negotiate concerning such state taxes and no credible way to oppose similar taxes imposed by other countries. If foreign nations impose similar taxes – for example, taxing lease hire between American leasing companies and American carriers entered into in the United States but

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case arose on audit, and the tax was imposed on Petitioner after the transaction was complete so that the impact of such taxes have not yet been felt by foreign ocean carriers.

involving containers whose possession changes abroad – Tennessee's action here will have made it virtually impossible for the United States to defend its citizens' interests. *Japan Line* recognized this problem with considerable perception:

> A State tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the state imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise. If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer. If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from "speaking with one voice" in regulating foreign commerce. [*Japan Line, supra*, 451 U.S. at 450-51.]

State sales and use taxes create a range of international conflict problems that go well beyond those foreseen in *Japan Line*. American states, applying existing use taxes, could tax revenue from container leases entered into abroad between foreign concerns even where possession changes abroad. Under the rationale used by the state court, such taxes would be constitutional since, if the foreign country imposed a tax based on change of possession or some other event there the state would be taxing a different event. If the foreign country did not tax

because it believed the Customs Conventions on Containers prohibited tax, Tennessee would cite an absence of any conflict. Yet it is hard to imagine a state tax that intruded more on foreign jurisdiction, rights and tax policies or that would more certainly and rightly provoke reaction.

E. Lease Hire Paid by Ocean Carriers May Not Be Subjected to Sales Tax Merely Because the Containers Are Owned By an American Company.

The state court rejected as discriminatory a distinction that would limit sales taxes to those imposed when the lessor is an American concern. App. 8a. The Tennessee court was correct in observing that such a distinction itself raises serious constitutional questions.[28] The Solicitor General, however, has urged adoption of a rule that would limit any constitutional constraints on state taxation of foreign containers to taxes imposed on containers owned by foreign entities or where foreign entities were the lessors stating: "For the same reasons that foreign nations possess a prior right to tax foreign-owned instrumentalities of foreign commerce, so too does this Nation and its States possess the right to tax the domestically owned instruments of commerce." Brief For the United States at 8-9. Under this proposal Petitioner's containers on lease to ocean carriers would be taxed, but those leased by Petitioner's foreign competitors would not.

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[28] *See Sears, Roebuck & Co. v. County of Los Angeles*, 449 U.S. 1119 (1981) *aff'g* 85 Cal. App. 3d 763 (1978); *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1, 14 (1986), *cert. denied*, 480 U.S. 930 (1987).

It is unusual for a government to propose tax discrimination against its own nationals. The only apparent justification for such a proposal, especially in context of fierce and continuing competition in international markets, would appear to be an overriding concern that if Tennessee's tax *were* imposed on transactions involving foreign lessors adverse foreign reaction contemplated in *Japan Line* would be probable. Discriminating against American lessors by imposing tax burdens only on ocean carriers dealing with American companies probably would eliminate the risk of international conflict and double taxation. However, that is because, in the case of price sensitive container leasing, such a ruling would discourage ocean carriers from dealing with American leasing companies. To avoid the tax, foreign lessees need only deal with foreign lessors. That solution to international conflict appears extreme and inequitable. Amici suggest that the correct rule is that containers subject to the Customs Conventions on Containers, and whose use is restricted to foreign commerce, should not be subject to such taxes at all.

II. THE TENNESSEE TAX CONFLICTS WITH THE CUSTOMS CONVENTIONS ON CONTAINERS.

The Customs Conventions on Containers reflect both a national policy and an international commitment by all signatory nations "to remove impediments to the use of containers as 'instruments of international traffic.' " *Japan Line, supra*, 441 U.S. at 453. The Conventions are important here not only as federal law superseding conflicting state law, but also as an important part of the analysis required under the Commerce Clause. Both as written and as uniformly understood and applied in practice, the

Conventions reflect an international consensus that containers admitted to a country as instruments of commerce not be subject to tax.

The Conventions are not properly interpreted simply by reading them as if they were tax regulations or the fine print of insurance policies. Rather they should be "construed more liberally" as an international charter in accordance with their history and "the practical construction adopted by the parties". *See Air France v. Saks*, 470 U.S. 392, 396 (1985); *quoting Choctaw Nation of Indians v. United States*; 318 U.S. 423, 431-32 (1943).

The Conventions preclude both "duties" which are assessed ad valorem on imported articles and "taxes" collected by reason of importation. The construction given to the Conventions by the state court and the Solicitor General is unduly restrictive, because they read "all duties and taxes whatsoever chargeable by reason of importation"[29] and "free of import duties and taxes and free of import prohibitions and restrictions"[30] as narrowly confined to "duties" imposed as of the moment of clearing customs. Clearly, taxes otherwise prohibited by the Conventions are not saved because they happen to be imposed by a state rather than the federal government or because they are imposed at an inland point or at the point of departure from the country. The Conventions could be evaded at will by such an approach. Any government, by assigning the right label to its tax and imposing it after initial import, could defy the Conventions by asserting that its subjective intent was not to tax the container "by reason of importation". This is not an

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[29] 1956 Convention, art. 1(a).

[30] 1972 Convention, art. 1(b).

interpretation that the United States would be likely to countenance if foreign countries so taxed American containers.

The foreign-built containers in question are available for lease in Tennessee only because they have been admitted under the Conventions and Customs regulations implementing them. The Conventions contemplate that the containers leave the country not later than three months after being admitted. 1972 Convention, art. 4. The proper and the only workable construction of the Conventions is that they prohibit any tax imposed on these instruments of foreign commerce, when admitted under Customs bond and in accordance with Customs regulations governing their use. That construction reflects a clear, enforceable line and an unambiguous standard that is free of subjective controversies over the intent of a particular tax. The construction proposed is a workable one which other nations observe. States of the United States should do so as well.

CONCLUSION

Amici respectfully urge the Court to hold the Tennessee tax to be contrary to the Constitution of the United States.

Respectively submitted,

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